(7)

Supreme Court, U.S.
FILED
JUN 29 2004
OFFICE OF THE CLERK

No. 03-725

IN THE

Supreme Court of the United States

DAVID B. PASQUANTINO, CARL J. PASQUANTINO & ARTHUR HILTS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

BRENDAN DOWD
FRANK GOLDMAN
JEREMY MALTBY
MARK TEETER
JAMES WALDEN
O'MELVENY & MYERS, LLP
7 Times Square
New York, New York 10036
(212) 326-2000

JOSHUA L. DRATEL*
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1150 18th Street, NW
Suite 950
Washington, D.C. 20036
(212) 732-0707

QUENTIN RIEGEL
NAT'L ASS'N OF MANUFACTURERS
Vice President, Litigation & Deputy General Counsel
1331 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 637-3000

*Counsel of Record

Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. UNDER THIS COURT'S ANALYSIS IN CLEVELAND AND McNALLY, A FOREIGN GOVERNMENT'S ASSERTED RIGHT TO COLLECT TAXES UNDER ITS OWN LAWS IS NOT "PROPERTY" PROTECTED BY THE WIRE FRAUD STATUTE. 6

A. The Wire Fraud Statute Protects Only Traditional Forms of Property. 6

B. The Government Has Effectively Conceded That Canada's Interest In Unassessed Liquor Duties Is Not "Property". 7

C. The Revenue Rule Bars Any Inference That Canada's Unassessed and Uncollected Liquor Duties Are Property. 9

D. Interpreting "Property" To Include Uncollected and Unassessed Foreign Tax Revenues Would Create a Sweeping Expansion of the Federal Criminal Jurisdiction..... 11

E. The Rule of Lenity Requires an Interpretation of Property That Excludes Unassessed and Uncollected Foreign Tax Revenues. 13

II. OTHER FACTORS AND CANONS OF CONSTRUCTION COUNSEL AGAINST READING FOREIGN TAX OBLIGATIONS AS PROPERTY UNDER THE FRAUD STATUTES. 14

TABLE OF CONTENTS
(continued)

Page

A. This Court Should Construe The Wire Fraud Statute Narrowly Due To The Inherent Difficulty In Proving The Contours Of Foreign Tax Law And The Uncertainties That Tax-Based Wire Fraud Prosecutions Will Create.....15

1. Proving Foreign Law Creates Numerous Problems for Courts and Litigants. 15

2. Proving Foreign Tax Law Would Create Additional Complications and Burdens. 17

3. Resting Wire Fraud Prosecutions on Foreign Tax Evasion Will Create Unfairness For Litigants and Provide Inadequate Notice of the Elements of the Offense. 21

B. Construing The Fraud Statutes To Reach Schemes To Evade Foreign Taxes Would Create Significant Separation Of Powers Problems.....24

C. The Fourth Circuit's Approach Requires U.S. Courts To Pass Judgment On Foreign Tax Laws, In Violation Of Established Precedent Rejecting Interpretations Of U.S. Law That Interfere With Foreign Governments. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Ashwander v. Tenn. Valley Auth.,
297 U.S. 288 (1936).....25

Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.,
268 F.3d 103 (2d Cir. 2001),
cert. denied, 537 U.S. 1000 (2002).....7, 27, 28

Carpenter v. United States,
484 U.S. 19 (1987).....6

Cheek v. United States,
498 U.S. 192 (1991).....18

Cleveland v. United States,
531 U.S. 12 (2000)..... *passim*

EEOC v. Arabian Am. Oil Co. ,
499 U.S. 244 (1991).....28

F. Hoffman-LaRoche Ltd. v. Empagran S.A.,
124 S. Ct. 2359 (2004).....4, 28, 29

Grayned v. City of Rockford,
408 U.S. 104 (1972).....26

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995).....8

Her Majesty v. Gilbertson,
597 F.2d 1161 (9th Cir. 1979).....9, 10, 11

Madanes v. Madanes,
186 F.R.D. 279 (S.D.N.Y. 2001) 24

McNally v. United States,
483 U.S. 350 (1987)..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Moore v. Mitchell,
30 F.2d 600 (2d Cir. 1929).....29

Moskal v. United States,
498 U.S. 103 (1990).....13

Republic of Honduras v. Philip Morris Cos.,
341 F.3d 1253 (11th Cir. 2003).....7

Rewis v. United States,
401 U.S. 808 (1971).....13

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984).....10

Sedima, S.P.R.L. v. Imrex Co.,
473 U.S. 479 (1985).....27

Shaw v. R.R. Co.,
101 U.S. 557 (1880).....11

Spies v. United States,
317 U.S. 492 (1943).....21

United States v. Bass,
404 U.S. 336 (1971).....13

United States v. BCCI Holdings (Luxembourg), S.A.,
977 F. Supp. 1 (D.D.C. 1997).....16

United States v. Bishop,
412 U.S. 346 (1973).....18

United States v. Bright,
353 F.3d 1114 (9th Cir. 2004).....8

United States v. Coriaty,
300 F.3d 244 (2d Cir. 2002).....8

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Gaudin,
515 U.S. 506 (1995).....19

United States v. Hasson,
333 F.3d 1264 (11th Cir. 2003),
cert. denied, 124 S. Ct. 2195 (2004).....8

United States v. McCann,
366 F.3d 46 (1st Cir. 2004).....19

United States v. McNab,
331 F.3d 1228 (11th Cir. 2003),
cert. denied, 124 S. Ct. 1406 (2004).....16, 17, 23, 29

United States v. Regan,
937 F.2d 823 (2d Cir. 1991).....20

United States v. Shipsey,
363 F.3d 962 (9th Cir. 2004).....19

United States v. Trapilo,
130 F.3d 547 (1997).....9

United States v. Vanhorn,
344 F.3d 729 (8th Cir. 2003),
cert. denied, 124 S. Ct. 1700 (2004).....8

STATUTES

16 U.S.C. § 1372.....12

16 U.S.C. § 3372.....12, 16

18 U.S.C. § 1956.....12

18 U.S.C. § 2313.....12

18 U.S.C. § 3006A.....17

18 U.S.C. § 3663A.....8

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

Adrian Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, 2001 Sing. J. Legal Stud. 280 (2001) 10

Extraterritorial Collection of State Inheritance Taxes, 29 Col. L. Rev. 782 (1929) 10

Robert A. LeFlar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193 (1932) 10

Nathaniel L. Goldstein, *Interstate Enforcement of Tax Laws of Sister States*, 30 Taxes 247 (1952) 10

Learned Hand, *Thomas Walter Swan*, 57 Yale L.J. 167 (1947) 18

Artie Jones, et al., *Racketeering Influenced and Corrupt Organizations*, 39 Am. Crim. L. Rev. 977 (2002) 27

Edward J. McCaffery, *The Holy Grail Of Tax Simplification*, 1990 Wis. L. Rev. 1267 18

Charles F. Midkiff, Note, *Extraterritorial Enforcement of Tax Claims*, 12 Wm. & Mary L. Rev. 111 (1970) 10

Bruce Zagaris, *Avoiding Criminal Liability In The Conduct Of International Business*, 21 Wm. Mitchell L. Rev. 749 (1996) 19, 20, 21

IN THE

Supreme Court of the United States

No. 03-725

DAVID B. PASQUANTINO, CARL J. PASQUANTINO & ARTHUR HILTS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

This brief is filed on behalf of the National Association of Criminal Defense Lawyers ("NACDL") and the National Association of Manufacturers ("NAM") as *amici curiae* in support of petitioners, with the written consent of the parties.[1]

---

[1] As required by Rule 37.6 of this Court, *amici curiae* submit that no party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of our adversary system of justice. NACDL frequently files briefs before this Court in cases implicating its substantial interest in substantive criminal law and the ambit of the mail fraud statute and definition of "property" thereunder.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and in all 50 states. Members of NAM are subject to increased use of criminal penalties in the regulatory state and to the uncertainty that attends the obligation to comply with laws and regulations of multiple (domestic and foreign) jurisdictions whose own construction of those laws is often ambiguous.

SUMMARY OF ARGUMENT

In the face of repeated efforts by prosecutors and lower courts to expand the reach of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, this Court has provided repeated and recent guidance that these statutes protect only well established property interests and that any ambiguities about their coverage "'should be resolved in favor of lenity.'" *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)); *see also McNally v. United* States, 483 U.S. 350 (1987) (same). Despite these clear instructions about the proper methodology for interpreting the mail and wire fraud statutes, the government prosecuted petitioners and obtained their convictions on the theory that they had schemed to take "property" in the form of unassessed and uncollected taxes purportedly due to a foreign government, even though the prosecution conceded that the centuries-old revenue rule barred the ostensible victim of that fraud from recovering its "property" in U.S. courts. The government's position and the reasoning of the courts below stand in flat contradiction to this Court's recent teachings, violate the principle of lenity in construing criminal statutes, and threaten a wholesale expansion of the mail and wire fraud statutes that would lead to unpredictable, unwieldy, and unfair prosecutions. For several reasons, this Court should reject the Fourth Circuit's reasoning, restore appropriate limits to the mail and wire fraud statutes, and vacate petitioners' convictions.

First, as explained in Petitioners' brief ("Pet. Br.") and in the brief *amici curiae* filed by NACDL and NAM in support of their petition for certiorari, the theory underlying petitioners' convictions is inconsistent with the methodology for interpreting the mail and wire fraud statutes set forth in *Cleve-*

land and *McNally*.[2] Second, given the complexity of foreign tax laws, the government's approach will ensure complicated and expensive evidentiary battles, burdening the courts, the Criminal Justice Act ("CJA") system, and litigants, and also create significant uncertainty for U.S. persons and companies doing business abroad. Third, a declaration that evasion of foreign taxes is actionable under the federal mail and wire fraud statutes will have dramatic repercussions throughout the criminal justice system, for it will make the same acts of evasion actionable under 29 of the state-law analogues to the federal RICO statute. Thus, contrary to the suggestions of the government and the Fourth Circuit, the federal executive will not have exclusive control over these claims; state and local prosecutors will be able to call on state courts to make definitive pronouncements concerning the contours and validity of foreign tax laws. Fourth, the decision below conflicts with the venerable canon of construction, most recently applied by this Court in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004), that requires courts, absent clear contrary indication, to interpret statutes in a way that minimizes interference with the operation of foreign law. In light of all the foregoing indicators, there is no basis for concluding that Congress would have expanded the mail and wire fraud statutes in this manner without providing explicit guidance. This Court should therefore reverse and vacate petitioners' convictions.

ARGUMENT

In addressing petitioners' challenge to their convictions, the Fourth Circuit erroneously separated its analysis of the revenue rule from its interpretation of the wire fraud statute. The Fourth Circuit began by assuming, for the sake of argument, that Canada's asserted right to taxes constitutes "property" protected by the wire fraud statute, *see* Pet. App. 5a, and then decided that the revenue rule did not bar the prosecution of petitioners because it did not seek to enforce a tax judgment. *See* Pet. App.11a-12a. Then, without regard to the revenue rule, to any of the canons of construction that this Court has consistently applied in analogous circumstances, or to the practical consequences of its ruling, the Fourth Circuit concluded that a foreign government's right to collect tax revenue is "property" under the wire fraud statute. *See* Pet. App. 15a-16a. By inverting its analysis, the Fourth Circuit reached an erroneous and dangerous result.

The wire fraud statute contains no indication – let alone a "clear statement" – that Congress intended it to reach schemes to evade foreign tax obligations. Because the revenue rule prevents foreign sovereigns from recovering asserted tax obligations in U.S. courts, such obligations do not constitute "property" within the wire fraud statute. It would defy logic to conclude that a foreign government could have a property right to money that it does not have a legal right to recover from the defendant. Permitting prosecutions based on foreign tax evasion would vastly expand the scope of federal criminal jurisdiction, lead to complicated and difficult trials, create significant separation-of-powers problems, and interfere with foreign relations. Thus, construed in light of the revenue rule and basic canons of statutory interpretation – including the rule of lenity as applied in this Court's recent mail and wire fraud precedents – the wire fraud statute cannot reasonably extend to schemes to evade foreign taxes.

---

[2] *See* Pet. Br. 37-46; Brief of the National Association of Manufacturers and National Association of Criminal Defense Lawyers as Amici Curiae at 7-8.

I. UNDER THIS COURT'S ANALYSIS IN *CLEVELAND* AND *McNALLY*, A FOREIGN GOVERNMENT'S ASSERTED RIGHT TO COLLECT TAXES UNDER ITS OWN LAWS IS NOT "PROPERTY" PROTECTED BY THE WIRE FRAUD STATUTE.

A. The Wire Fraud Statute Protects Only Traditional Forms of Property

This Court has repeatedly made clear that Congress intended the mail and wire fraud statutes to protect "property rights." *McNally v. United States*, 483 U.S. 350, 356 (1987) (mail fraud); *Carpenter v. United States*, 484 U.S. 19, 28 (1987) (wire fraud). This Court has also emphasized that the scope of "property" should be narrowly construed: "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *McNally*, 483 U.S. at 360 (quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926)). In *McNally*, this Court refused to read the statute in a way that "leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," and therefore declared that § 1341 is "limited in scope to the protection of property rights" and that without "clear and definite language" from Congress, this Court will not select a "harsher" reading of a criminal statute that expands federal criminal law. *Id.* In *Cleveland*, this Court reiterated and expanded the same message, providing a detailed methodology for interpreting "property" in the mail and wire fraud statutes. Relying on the legislative history of the mail and wire fraud statutes, this Court rejected "the Government's theories of property rights [which] stray from traditional concepts of property." 531 U.S. at 24.[3]

[3] As discussed in petitioners' brief, this Court has also explained that the mail and wire fraud statutes incorporate the common law elements of fraud and its background. *See* Pet. Br. 32-33 (citing *Neder v. United States*, 527 U.S. 1, 23-25 (1999)). As a foreign sovereign would not have been able to assert a common law fraud claim based on the asserted loss of tax revenue - and, indeed, cannot do so today, *see Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 130-34 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002); *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1258 (11th Cir. 2003) - this discussion confirms the conclusion that the wire fraud statute may not be read to include the alleged evasion of foreign taxes.

In short, this Court explained that the "property" protected by these statutes must be understood in terms of "traditional concepts of property" and that any ambiguity in its meaning "should be resolved in favor of lenity." 531 U.S. at 25. This Court also made clear that it will not "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.* at 24. Finally, the Court clarified that the only schemes prohibited by the mail and wire fraud statutes are those that aim to take "property" that is "in the hands" of the victim. *Id.* at 15. Thus, according to this Court's clear direction, before allowing a prosecution under the mail and wire fraud statutes, courts must assure themselves that the alleged scheme seeks to take away clearly defined "property" that is already in the hands of the victim, and that Congress gave clear indication of its intent to criminalize the conduct. Any ambiguity must be resolved in favor of lenity. The asserted property interest underlying petitioners' conviction – Canada's purported right to collect unassessed duties on imported liquor – fails this Court's definition of "traditional theories of property" at every turn.

B. The Government Has Effectively Conceded That Canada's Interest In Unassessed Liquor Duties Is Not "Property"

The government, by its conduct in this case, effectively conceded that the Canadian government lacked any property interest protected by the wire fraud statute. The Mandatory

Victims Restitution Act removes any discretion from the sentencing court, requiring it to impose a restitution order following conviction for wire fraud, directing the defendant to return "the property" to the "victim" or the "owner."[4] The government, however, did not seek a restitution order in this case, stating that such an award was "not appropriate in this case since the victim is a foreign government and the loss derives from tax laws of the foreign government." *See* Govt's Statement of Facts and Applicable Sentencing Factors at 3 (Feb. 16, 2001). Thus, the government in effect conceded that, whatever Canada's interest in uncollected taxes, that interest was not "property" under the restitution statute. This concession is fundamentally at odds with the claim that Canada's unassessed taxes are "property" protected by the wire fraud statute.

As § 3663A(c)(1)(A)(ii) refers specifically to "any offense committed by fraud or deceit," it makes no sense to give the word "property" one meaning for the substantive offense and another for sentencing purposes. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("identical words used in different parts of the same act are intended to have the same meaning" (quotation and citations omitted); "[i]f the contract before us is not a prospectus for purposes of §

[4] *See* 18 U.S.C. § 3663A(b)(1)(A) (where offense results in loss of "property," defendant must "return the property to the owner"); § 3663A(c)(1)(A)(ii) (mandating restitution if the crime is "an offense against property under this title . . . including any offense committed by fraud or deceit"); § 3663A(c)(1)(B) (mandating restitution for crimes "in which an identifiable victim or victims has suffered . . . pecuniary loss"); *see also United States v. Bright*, 353 F.3d 1114, 1120 (9th Cir. 2004) (18 U.S.C. § 3663A(c)(1)(A)(ii) mandates restitution for mail fraud offenses); *United States v. Vanhorn*, 344 F.3d 729, 730 (8th Cir. 2003) (same), *cert. denied*, 124 S. Ct. 1700 (2004); *United States v. Hasson*, 333 F.3d 1264, 1275 (11th Cir. 2003) (mandating restitution for mail and wire fraud pursuant to § 3663A(c)(1)(B)), *cert. denied*, 124 S. Ct. 2195 (2004); *United States v. Coriaty*, 300 F.3d 244, 252 (2d Cir. 2002) (restitution mandatory under 18 U.S.C. § 3663A(c)(1)(A)(ii) for wire fraud).

10 [of the Securities Act] -- as all must and do concede -- it is not a prospectus for purposes of § 12 either"). As the government's position at sentencing shows, its theory of "property" strayed far from "traditional" forms of property protected by the mail and wire fraud statutes, which were designed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing *the innocent people in the country*." *See McNally*, 483 U.S. at 356 (quoting Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)) (emphasis added).

C. The Revenue Rule Bars Any Inference That Canada's Unassessed and Uncollected Liquor Duties Are Property.

Even if the Canadian government has a right to payment under Canadian law, the well-established common law revenue rule nevertheless bars it from enforcing that right in the courts of the United States. Courts – even those that have upheld convictions like petitioners' – have uniformly acknowledged that a foreign sovereign may not enforce its tax judgments in the courts of this country.[5] Indeed, there is general agreement that the revenue rule has firm roots in the common law and that any court can invoke it to prevent a foreign sovereign from enforcing its revenue laws within its jurisdiction. *See* Pet. Br. 7-13.

The doctrine was, in fact, "so well recognized" that it was not until the 1970's – well after passage of both the mail and wire fraud statutes – that a foreign government sued in an American court to enforce a foreign tax judgment. *See Her Majesty v. Gilbertson*, 597 F.2d 1161, 1164 (9th Cir. 1979). Even in that case, the court refused to enforce the

[5] *See United States v. Pasquantino*, Pet. App. 5a-7a; *see also United States v. Trapilo*, 130 F.3d 547, 552-53 (1997) (reversing dismissal of indictment).

judgment, saying that the revenue rule "has been with us for centuries and as such has become firmly embedded in the law." *Id.* at 1166. Indeed, numerous commentators have recognized that foreign sovereigns may not invoke the jurisdiction of a U.S. court to collect on a tax judgment. *See generally*, Adrian Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, 2001 Sing. J. Legal Stud. 280 (2001); *Extraterritorial Collection of State Inheritance Taxes*, 29 Col. L. Rev. 782 (1929); Nathaniel L. Goldstein, *Interstate Enforcement of Tax Laws of Sister States*, 30 Taxes 247 (1952); Robert A. LeFlar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193 (1932); Charles F. Midkiff, Note, *Extraterritorial Enforcement of Tax Claims*, 12 Wm. & Mary L. Rev. 111 (1970).[6]

In light of the courts' consistent refusal to enforce any foreign government's "right" to collect tax revenue in an American courtroom, the inescapable conclusion is that such a "property right" does not exist at common law or under the laws of the states. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) ("'[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state

[6] The government argues that because courts have upheld mail and wire fraud prosecutions for evasion of U.S. state and federal taxes means that, "by its terms, the wire fraud statute applies to schemes to defraud foreign governments of tax revenue." Brief of the Solicitor General in Opposition to Certiorari ("Cert. Opp.") at 6-7 (citing *United States v. Goulding*, 26 F.3d 656, 663 (7th Cir.), *cert denied*, 513 U.S. 1061 (1994); *United States v. Dale*, 991 F.2d 819 (D.C. Cir.), *cert. denied*, 510 U.S. 906 (1993); *United States v. Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992), *United States v. Melvin*, 544 F.2d 767 (5th Cir.), *cert. denied*, 430 U.S. 910 (1977); *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975)). There are two problems with the government's position. First, it ignores the tremendous difference the revenue rule draws between domestic and foreign taxes. Second, these cases it cites do not appear to survive *Cleveland's* requirement that the defendant, through his scheme, obtain property that is "in the hands" of the victim. 531 U.S. at 15.

law'") (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972))). Simply put, a person can depart from a foreign jurisdiction with proceeds to which the foreign government claims a right under its revenue laws, and American courts will not enforce the sovereign's right to collect the money. *See Gilbertson*, 597 F.2d at 1162-63.

The lower courts' discussions of whether the revenue rule is permissive or mandatory, and whether the policies that underlie it are valid or antiquated, have little bearing on the viability of this prosecution. Because Congress enacted the wire fraud statute against this common law backdrop forbidding the enforcement of foreign tax judgments in U.S. courts, longstanding canons of statutory construction compel the conclusion that the revenue rule was unaffected. *See Shaw v. R.R. Co.*, 101 U.S. 557, 565 (1880) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."). As the Canadian government could not have enforced its purported right to collect taxes against any of the petitioners in any U.S. court, that right can scarcely fall within the "traditional concepts of property" held in *Cleveland* to be enforceable under the wire fraud statute. In short, the Canadian government had no property or enforceable property right in its hands.

D. Interpreting "Property" To Include Uncollected and Unassessed Foreign Tax Revenues Would Create a Sweeping Expansion of the Federal Criminal Jurisdiction.

It is plain that the theory of this prosecution would work a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland*, 531 U.S. at 24. Under the government's theory, any use of the United States mail or wires as part of an effort to evade for-

eign taxes would be subject to criminal prosecution in the United States. Thus, even acts of tax evasion treated by foreign law as *civil* violations would be criminally punishable in the United States. Opening the U.S. criminal justice system to any use of the mail or wires in furtherance of foreign tax evasion – civil or criminal – unquestionably represents a vast expansion of federal criminal jurisdiction, but there is no indication, let alone a "clear statement," that Congress intended such a result.

When Congress wants to make the violation of the civil or criminal laws of another nation an element of a federal criminal offense, it knows how to do so unambiguously, with clear language that leaves no doubt as to its intentions. *See, e.g.*, 16 U.S.C. § 1372(c)(1)(B) (making it illegal to import a marine mammal "taken in another country *in violation of the law of that country*") (emphasis added); 16 U.S.C. § 1372(c)(2)(B) (banning the import of any marine mammal product if "the sale in commerce of such product *in the country of origin* of the product is illegal") (emphasis added); 18 U.S.C. § 1956(c)(1) ("the term 'knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity' means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or *foreign law*") (emphasis added); 18 U.S.C. § 2313(a) ("[w]hoever receives, possesses, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, which has crossed a State or United States boundary after being stolen . . ."); 16 U.S.C. § 3372(a)(2)(A) (banning the importation of wildlife which has been "taken, possessed, transported, or sold *in violation of any . . . foreign law*") (emphasis added). The wire fraud statute contains no such explicit statement to incorporate foreign revenue rules. To the contrary, there is nothing on the face of the wire fraud statute that implicates

issues of foreign law, or suggests that a violation of foreign tax law could trigger its provisions.

E. The Rule of Lenity Requires an Interpretation of Property That Excludes Unassessed and Uncollected Foreign Tax Revenues.

Under *McNally* and *Cleveland*, the rule of lenity requires an interpretation of the wire fraud statute that excludes unassessed and uncollected foreign tax revenues from its ambit. This "venerable principle," *Moskal v. United States*, 498 U.S. 103, 131 (1990) (Scalia, J., dissenting), requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). This Court has "[i]n various ways over the years . . . stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)). Justice Scalia's dissent in *Moskal* states succinctly what has been an unwavering principle of construction for federal criminal statutes: "[t]he temptation to stretch the law to fit the evil is an ancient one, and it must be resisted." 498 U.S. at 132.

Both *McNally* and *Cleveland* relied on this rule to constrain the federal government's attempts to expand the scope of "property" in the fraud statutes. *See Cleveland*, 531 U.S. at 25 ("In deciding what is 'property' under § 1341, we think 'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite'") (quoting *Universal C.I.T. Credit Corp.*, 344 U.S. at 222); *McNally*, 483 U.S. at 360 ("Rather than construe the statute in such a manner that leaves its outer boundaries ambiguous . . . we read § 1341 as limited in

scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has").

In this usual case, the government has essentially argued that the definition of "property" in the fraud statutes has two meanings – one when it attempts to prosecute individuals for schemes to evade foreign tax laws but a different, more limited definition (reflecting the common law revenue rule) when foreign governments attempt to collect civil judgments under the RICO statute. *See* Brief for the United States as Amicus Curiae at 7, 16, *Attorney General of Canada v. R.J. Reynolds Tobacco Holding, Inc.* (S. Ct. case no. 01-1317) (Oct. 2002). To accept such an approach would stand the rule of lenity on its head. Even if one could conclude that there is an open question about Congress' intentions, the rule of lenity forbids split meanings of this sort; rather, this Court must adopt the narrower reading of the statute. Following this Court's directive in *McNally* and *Cleveland*, the Fourth Circuit should have required Congress to "speak more clearly than it has" before the courts may interpret the definition of "property" to encompass a property right that cannot be enforced in an American court under the laws of the states and the common law. *McNally*, 483 U.S. at 360.

II. OTHER FACTORS AND CANONS OF CONSTRUCTION COUNSEL AGAINST READING FOREIGN TAX OBLIGATIONS AS PROPERTY UNDER THE FRAUD STATUTES.

Although the analytical framework set forth in *Cleveland* and applied above provides sufficient reason to reject the government's reading of the wire fraud statute, additional factors and canons of construction provide further support for this result. Permitting wire fraud prosecutions based upon alleged schemes to evade foreign taxes will (1) create unwieldy prosecutions burdening courts, juries, defendants, and the CJA system with complicated and expensive proof of the contours of foreign law, while creating substantial uncer-

tainty about prohibited conduct; (2) raise significant separation-of-powers concerns and create friction with foreign governments; and (3) violate established canons of statutory construction designed to minimize interference and friction with foreign sovereigns. To avoid such undesirable results, this Court should read the wire fraud statute as excluding alleged schemes to evade foreign taxes.

A. This Court Should Construe The Wire Fraud Statute Narrowly Due To The Inherent Difficulty In Proving The Contours Of Foreign Tax Law And The Uncertainties That Tax-Based Wire Fraud Prosecutions Will Create.

Because the burdens and vagaries of ascertaining and proving foreign law are substantial – even on issues far simpler than tax and revenue rules – this Court should interpret statutes to incorporate foreign law as part of an offense only when Congress has provided an unambiguous statement that it so intended. The experience of the courts with ascertaining foreign law, even in instances when Congress explicitly incorporates the foreign law, is instructive. These experiences do not suggest that Congress may never incorporate foreign law as an element of a federal criminal offense, or even that it is necessarily unwise as a matter of policy to do so. Rather, they illustrate that incorporating foreign law has serious consequences because pleading and proving foreign law is unpredictable and imposes burdens on the courts, juries, the parties, and the public fisc. Appropriately, Congress has incorporated foreign law sparingly. Courts should likewise hesitate to read foreign law into criminal offenses absent an unambiguous instruction from Congress.

1. Proving Foreign Law Creates Numerous Problems for Courts and Litigants

Under Federal Rule of Criminal Procedure 26.1, the party invoking foreign law must provide notice and bears the burden of proving foreign law. Proving that law is often

very complicated and expensive for the parties and burdensome for the courts. Although *United States v. BCCI Holdings (Luxembourg), S.A.*, 977 F. Supp. 1 (D.D.C. 1997), involved civil proceedings, it illustrates this problem. There, the parties retained no fewer than *six* experts to opine on Bangladeshi banking law to determine under what circumstances a Bangladeshi bank obtains right, title and interest to foreign exchange held by authorized dealers. These experts included a former Bangladeshi Supreme Court Justice and former Bangladesh cabinet officials. *Id.* at 8-9 & nn.11 – 14, 17-18.

United States v. McNab, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 1406 (2004), provides a vivid illustration of the difficulties in obtaining a clear picture of foreign law on even relatively simple issue of animal importation (as opposed to revenue laws). In this prosecution under the Lacey Act, which prohibits the importation of wildlife which has been "taken, possessed, transported, or sold in violation of any . . . foreign law," 16 U.S.C. § 3372(a)(2)(A), the government claimed that the defendants had imported lobsters that had been taken and packaged in ways that violated the laws and/or regulations of Honduras. In particular, the government claimed that Honduran law prohibited taking egg-bearing lobsters and lobsters with tails smaller than 5.5 inches. *See* 331 F.3d at 1233. To establish this apparently straightforward proposition of Honduran law, the parties presented at least five testifying experts, including the "highest-ranking legal official" in the relevant Honduran ministry (who testified for the prosecution) and two law professors – "both experts in Honduran law," *id.* at 1234 & n.7 - who testified for the defendants. The defense also presented legal opinions from members of the Honduran legal community, including the attorney general of Honduras and a regional prosecutor, and a declaration from a practicing Honduran attorney. *Id.* at 1234 n.7. The government received guidance in the course of its investigation and prosecution

from approximately nine additional Honduran government officials, all putative experts on Honduran export laws who attested to the validity of one of the Honduran laws at issue and the fact that the defendants violated it. *Id.* at 1232-35. Ultimately, all of the government's experts proved to be wrong in their assessments. In the courts of Honduras, the defendants successfully challenged the validity of the Honduran regulations underlying their convictions. In the end, even the Embassy of Honduras supported the defendants on appeal with a brief *amicus curiae*. *Id.* at 1240 n.23. *See infra* at 21-23, 28.

Although the parties in *McNab* and *BCCI Holdings* were able to shoulder the vast financial expense of obtaining extensive expert testimony, many criminal defendants will lack the means to do so. Under the CJA, 18 U.S.C. § 3006A(e)(3), there is a presumptive limit of $1,000.00 to compensate any expert approved by the court.[7] Experts on foreign revenue laws will certainly exhaust those limits in every instance. Thus, defendants may face substantial difficulties in presenting defenses based on foreign law. Even if courts authorize defendants to exceed the meager limits set forth in the CJA, the cost of such experts will then fall on the public at large.

2. Proving Foreign Tax Law Would Create Additional Complications and Burdens.

If it is difficult and burdensome to ascertain and prove the contours of foreign law in regulations concerning the size of lobsters, tax and revenue laws present even greater problems. Laws of this kind are full of subtle distinctions and gray areas; the scope and gradations of tax evasion and the lines of demarcation between criminal and civil tax liability

---

[7] This Court should not presume that prosecutions for evasion of foreign taxes will fall only on the wealthy. This case is evidence to the contrary; petitioners were indigent and benefited from appointed counsel and the CJA system. *See* J.A. 20-26 (docket sheet indicating CJA applications).

are complicated and continually changing. Indeed, this Court has noted the "complexity of [U.S.] tax laws," and explained that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Cheek v. United States*, 498 U.S. 192, 199-200 (1991); *see also United States v. Bishop*, 412 U.S. 346, 360 (1973) ("In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law"). Even the IRS, "whose institutional response to technically complex laws is an abysmally low rate of correct answers to telephone queries" (approximately 76 percent in 1990), has patent difficultly understanding U.S. tax law.[8] This "complexity" has led Congress to "soften[] the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses." *Cheek*, 498 U.S. at 200. No less a legal mind than Judge Learned Hand confessed to confusion in dealing with U.S. tax law:

> [T]he words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.

Learned Hand, *Thomas Walter Swan*, 57 Yale L.J. 167, 169 (1947).

[8] Edward J. McCaffery, *The Holy Grail Of Tax Simplification*, 1990 Wis. L. Rev. 1267, 1271 n.19 (citing Robert Hershey, *Creaky I.R.S. is at a Crossroads*, N.Y. Times, Apr. 7, 1990, at 33).

Given the complexities of U.S. tax law, analysis of less familiar foreign tax laws would necessarily pose an even greater challenge to U.S. courts, juries, and litigants. One such obstacle may arise in discerning the contours of tax avoidance. Although acts of tax *fraud* may be unambiguous in many cases, the scope of tax *avoidance* is largely a matter of degree, and differs widely from country to country.[9] Thus, if the evasion of foreign taxes becomes a predicate for mail and wire fraud offenses, U.S. courts will have to develop expertise about the operation and effect of foreign revenue laws (comparable in complexity to our own tax laws) to ascertain whether the foreign sovereign actually had a property right to the tax revenue alleged.

If the government's theory of the wire fraud statute prevails, it will have to establish that defendants intended to evade foreign taxes. Because the mail and wire fraud statutes are specific intent crimes, *see, e.g., United States v. McCann*, 366 F.3d 46, 51 (1st Cir. 2004) (mail fraud); *United States v. Shipsey*, 363 F.3d 962, 971 (9th Cir. 2004) (wire fraud), this showing will require proof that a tax obligation was due and that the defendant intended to evade or assist in the evasion of that obligation. Thus, in every case the defendant will be able to offer evidence of good faith belief in compliance with the foreign tax or revenue laws. As a result, juries will often have to make determinations about the scope and operation of foreign law and defendants' intentions concerning foreign law. *See United States v. Gaudin*, 515 U.S. 506, 522-23 (1995) (discussing defendant's Fifth and Sixth Amendment rights "to have a jury determine, be-

[9] *See* Bruce Zagaris, *Avoiding Criminal Liability In The Conduct Of International Business*, 21 Wm. Mitchell L. Rev. 749, 804 (1996)(citing 68a Cahiers De Droit Fiscal International [Studies on International Fiscal Law] (1983)(A survey concluded that it is not possible to identify with reasonable certainty the common criteria or underlying concepts of evasion analysis)).

yond a reasonable doubt, his guilt of every element of the crime with which he is charged"). In the absence of admissions on the issue of intent, the prosecution will likely need to prove this element by establishing for the jury the contours of the foreign tax law and showing that, under the circumstances, the defendant could only have intended to defraud the foreign sovereign. To prove good faith, defendants will be entitled to offer expert testimony to explain to the jury any ambiguities in the law at issue, and that their positions are legitimate, or within the bounds of reason. In short, the jury can only make a determination that the defendant acted with specific intent if it finds beyond a reasonable doubt both (a) the foreign law was clear and unambiguous, and (b) a person in the defendant's shoes must have known he was violating that law. *Cf. United States v. Regan*, 937 F.2d 823, 827 (2d Cir. 1991) ("the issue for the jury was not how the district court interpreted [26 U.S.C. §] 1058; it was how the defendants in good faith interpreted it").[10]

Given the diversity and complexity of foreign revenue laws, advancing claims and defenses of these kinds will require courts and parties to obtain a level of understanding of foreign laws and legal systems that will be prohibitively difficult and expensive to achieve. For example, some countries, such as Greece, Brazil, Argentina and Italy, consider non-arm's-length transactions to be tax evasion.[11] Nonresident taxpayers could be charged with tax evasion where their investment income was taxed at source or where capital gains tax was applied to the disposal of real estate or share-

[10] Although the government may argue that the determination of the foreign law is for the judge in a preliminary hearing under Fed. R. Crim. P. 26.1, and not the jury, any other result would deprive the defendant his rights under the Confrontation Clause, as well his right to have the jury determine "all elements of the crime."

[11] *See* Zagaris, *supra*, at 807.

holdings.[12] Other countries "have enacted ad hoc provisions to counteract illegitimate reductions of tax burdens when the taxable objects or subjects cross national boundaries."[13] For instance, Canada imposes a "departure tax" on a taxpayer who ceases to be a Canadian resident and has "disposed of the whole of his assets (other than property remaining subject to Canadian taxation) at their fair market value at the time of his emigration."[14] A U.S. court would be required to interpret such diverse and complex foreign tax laws to determine whether the foreign sovereign actually had a property right which gave rise to liability under the wire fraud statue. These exercises will make the prosecution of such cases extraordinarily cumbersome and expensive.

3. Resting Wire Fraud Prosecutions on Foreign Tax Evasion Will Create Unfairness For Litigants and Provide Inadequate Notice of the Elements of the Offense.

In addition to these inevitable problems of proof, prosecuting fraud claims based on foreign tax law guarantees uncertainty and threatens significant unfairness to litigants. In particular, if the fraud statute covers the failure to pay foreign taxes, it will be extremely difficult for U.S. individuals and businesses to predict with any confidence exactly what behavior that statute prohibits.

As discussed above, *see supra* at 15-20, U.S. tax law is exceedingly complicated and gives rise to a host of honest mistakes and disagreements about its scope and appropriate exemptions and deductions. *See Spies v. United States*, 317 U.S. 492, 496 (1943) (recognizing that U.S. tax laws create "problems of great complexity, and innocent errors are numerous," as evidenced by the vast number of overpayments

[12] *Id.*

[13] *Id.*

[14] *Id.*

received by the I.R.S. each year). Given the acknowledged difficulty in interpreting U.S. tax law, it is nearly impossible to predict how a U.S. court might apply a foreign revenue law. As *McNab* makes clear, even foreign legal authorities often differ about the interpretation of their own laws. Thus, when foreign tax laws are not applied consistently even by courts in their countries of origin, it will be difficult for businesses with international operations to make long-term business plans. The fact that the unintentional violation of an obscure foreign tax law could result in criminal penalties under the wire fraud statute could have chilling implications for all U.S. businesses that are involved in international transactions. Equally disturbing is the notion that the question of whether or not such a foreign tax law actually gives rise to any tax liability would be determined by a U.S. court's interpretation of the foreign law. Similarly, defendants would be sentenced on the basis of a federal court's estimation as to how much in taxes would have been owed under the foreign revenue law.[15] In today's climate of corporate skepticism, the mere possibility of such criminal liability may have a significant *in terrorem* effect that prevents U.S. companies from taking legitimate positions regarding their foreign tax liability, thus putting them at a competitive disadvantage to foreign competitors. Worse, businesses that take legitimate but aggressive positions with respect to their foreign tax liabilities could ultimately face criminal prosecution for failing to predict how a U.S. Court would interpret the foreign revenue laws that govern their conduct. This Court should reject an interpretation of the wire fraud statute that creates such uncertainties.

Finally, incorporating foreign tax laws as predicate offenses to federal criminal statutes is also a dangerous exercise because it creates a host of pitfalls for defendants, even those who successfully contest the validity of the foreign law. For example, in *McNab*, although the defendants ultimately convinced a Honduran court of the invalidity of one of the Honduran administrative laws that provided the predicate for their conviction under the Lacey Act, their U.S. convictions were affirmed.

[15] *See* Pet. App. 24a-26a; *see supra* § I.B discussing Mandatory Victims Restitution Act, requiring that sentencing court order the defendant to return the property of which the victim was defrauded.

Although the Honduran ruling had retroactive effect under the Honduran constitution, and would have invalidated any convictions in Honduras, 331 F.3d at 1249, the Eleventh Circuit nonetheless affirmed the convictions because, according to the government's testifying expert, the predicate Honduran law offense was an administrative rather than a criminal matter and thus was not entitled to retroactive effect. *Id.* at 1243 & n.29. Although they were consistently right on foreign law before trial and obtained a definitive statement from the Honduran court that the predicate *administrative* offense was null and void, defendants' U.S. *criminal* convictions and sentences of 97 months and 24 months stood unaffected. As the dissent noted, "had U.S. law been implicated, reversal of the convictions would not be in question and the case would easily be resolved in the defendants favor. In the United States, where a substantive criminal law is subsequently declared to be invalid by the courts, any convictions thereon would be reversed." *Id.* at 1248-49 (Fay, J., dissenting).

Furthermore, foreign tax law operates as part of a broader legal system that accomplishes the foreign legislature's objectives through the balance of that country's procedural and constitutional protections. Application and interpretation by a U.S. court of foreign revenue laws would necessarily strip the defendant of those protections or put the court in a position of interpreting the foreign country's con-

stitution and procedural laws as well.[16] For example, a Canadian citizen might expect that if prosecuted for alleged violations of a Canadian law, a Canadian Court would interpret and apply the law subject to Canadian procedural and constitutional safeguards. But under the Fourth Circuit's view of the wire fraud statute, the United States government could prosecute citizens of other countries for the alleged violations of their home country's tax laws without providing them the procedural protections that would otherwise be available in their home country. This could have the bizarre result of a defendant being incarcerated in the U.S. for violating a foreign statute that would not have resulted in his conviction were he tried in his home country, where the law was originally enacted.

B. Construing The Fraud Statutes To Reach Schemes To Evade Foreign Taxes Would Create Significant Separation Of Powers Problems.

Both the Fourth Circuit and the government have argued that mail and wire fraud prosecutions based upon alleged schemes to evade putative foreign tax obligations do not "implicate the separation-of-powers considerations that underlie the revenue rule." Cert. Opp. 7-8 (citing Pet. App. 14a). Although the court below and the government acknowledge that "courts are ill-equipped to decide when foreign governments should be permitted to enforce their revenue laws in this country and that such judgments are more appropriately made by the legislative and executive branches of the government," Cert. Opp. 7-8; *see also* Pet. App. 14a, they conclude that this case does not raise such a concern

[16] For example, in *Madanes v. Madanes*, 186 F.R.D. 279, 286 (S.D.N.Y. 2001), the court noted that Argentina grants its citizens a right against self-incrimination that is broader than that granted by the United States constitution. "Thus, it is contrary to Argentina's national interest if its citizens' rights are circumvented when the are sued in forums where those rights are not recognized". *Id.*

because the Executive Branch has "legislative authorization" to bring a federal wire fraud prosecution of this kind and will do so "only when the Executive Branch decides that it is in the interest of the United States." Cert. Opp. 8; *see also* Pet. App. 14a ("[T]o the extent matters of foreign policy were implicated by prosecution of the Defendants . . . such matters were passed upon by the only two branches of our federal government charged by our Constitution with the power to make foreign policy decisions."). At a minimum, the Fourth Circuit's reading raises a serious constitutional question of separation powers, and should therefore be rejected. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (articulating principle of narrow statutory construction to avoid constitutional problems). For four reasons, these arguments are unconvincing.

First, contrary to the government's entirely unsupported assertion, there is no evidence of "legislative authorization" for the executive and judiciary to take upon themselves the delicate task of interpreting the revenue and penal laws of foreign sovereigns. The Fourth Circuit found such authorization in the fact that "Congress enacted the wire fraud statute." Pet. App. 14a. But that logic is circular, for there is no indication in the text of the mail and wire fraud statutes, or even in their legislative histories, that Congress intended to abrogate or create an exception to the venerable common law revenue rule, thereby authorizing prosecutions for schemes to evade foreign taxes. Indeed, as discussed in detail in petitioners' brief, the most relevant evidence from Congress – applicable legislation and treaties – all point in the other direction, suggesting that Congress envisioned a fundamentally different approach to the vindication of Canada's interests in cases like these. *See* Pet. Br. 46-51 (discussing laws and treaties aimed at smuggling and reciprocal assistance in enforcing tax laws).

Second, even if the Executive Branch screens cases and initiates prosecutions only when it "decides that it is in the interest of the United States to do so," Cert. Opp. 8, that assurance does little to alleviate the substantial foreign policy and separation-of-powers concerns that arise when the judiciary adjudicates claims that implicate foreign tax law.[17] As explained in petitioners' brief, the revenue rule seeks to avoid the diplomatic friction and embarrassment that results when the courts of one nation reject the tax or revenue laws of another, or call into question another government's view of its own laws. *See* Pet. Br. at 12-13. Even if the Executive Branch should determine before bringing a prosecution that its view of a foreign tax law is consistent with the views of the foreign government, the Executive Branch cannot be sure that a judge or jury will regard the foreign tax law in the same way. As discussed above, *see supra* at 15, Federal Rule of Criminal Procedure 26.1 makes clear that the trial court must determine the scope and contours of foreign law. Courts are of course free to disagree with the views of the Executive, and juries are entitled to acquit if they view the operation of foreign law as unjust. Thus, the Executive Branch has no way to ensure that a wire fraud prosecution grounded in an asserted violation of foreign tax law will not result in the rejection or misinterpretation of foreign law. By

[17] The government's assurance that it will screen cases using some undisclosed criteria to protect the interests of the United States is troubling for a separate reason: It provides no guidance whatsoever for potential defendants. As discussed above, *see supra* § II.A(1)(2), the complexities of foreign tax and revenue laws already make it difficult to predict in advance what types of conduct might fall within the government's reading of the wire fraud statute. The government's indication that it intends to prosecute only a subset of those cases, selected pursuant to undisclosed guidelines, is the essence of arbitrary and discriminatory enforcement. Standards for prosecution must reside in plain view, within the law itself. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

bringing prosecutions of this kind, the Executive Branch places the interpretation of foreign tax laws in the hands of decisionmakers over whom it has no control, creating a substantial risk of precisely the kinds of harms that the revenue rule seeks to avoid.

Third, even if the Executive Branch were able to limit offense to foreign governments by controlling federal wire fraud prosecutions based on foreign tax evasion, it could do little to exercise the same kind of control over prosecutions brought by state and local prosecuting authorities under state law analogues to RICO. Some twenty-nine of these statutes use federal mail and wire fraud as a predicate offense. *See* Artie Jones, et al., *Racketeering Influenced and Corrupt Organizations*, 39 Am. Crim. L. Rev. 977, 978 n.1 (2002). Accordingly, if this Court determines that schemes to evade foreign taxes are actionable federal mail and wire fraud, it will effectively give rise to twenty-nine different crimes under state law. Neither the federal Executive, nor the federal courts, will have any authority to restrain prosecutions of this kind. The prospect of the courts of twenty-nine different states opining about the interpretation, operation, and validity of the revenue laws of different countries illustrates the importance of construing the mail and wire fraud statutes narrowly, in adherence to the common law revenue rule.

Finally, the recognition of foreign tax evasion as a basis for federal mail and wire fraud also raises the possibility that private plaintiffs may bring civil RICO claims based upon alleged acts of foreign tax evasion.[18] Like criminal prosecu-

[18] This Court has certainly allowed civil RICO claims are appropriate where a plaintiff claims to have suffered competitive harm from a defendant's ability to reduce its costs by conducting business through predicate acts. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n.15 (1985) (approving examples provided by dissent). The government may also argue that federal mail and wire fraud prosecutions for foreign tax evasion are *sui generis*, do not give rise to private rights of action or criminal liability under state laws. *Cf. Attorney Gen. of Canada*, 268 F.3d at 122-

tions under state RICO analogues, these private civil claims would stand beyond the control of the federal government, and would require federal courts to interpret and pass upon the validity of foreign tax laws. For this reason, civil RICO claims using this type of mail and wire fraud as a predicate act presents the same separation-of-powers problem and the same risks of substantial damage to foreign relations.

C. The Fourth Circuit's Approach Requires U.S. Courts To Pass Judgment On Foreign Tax Laws, In Violation Of Established Precedent Rejecting Interpretations Of U.S. Law That Interfere With Foreign Governments.

As this Court has repeatedly explained and very recently reiterated, it is ordinarily appropriate to "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-LaRoche*, 124 S. Ct. at 2366; *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (discussing longstanding principle of American jurisprudence "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States") (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). "This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *F. Hoffman-LaRoche*, 124 S. Ct. at 2366. By avoiding conflict and interference with foreign laws, this canon of interpretation "helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Id.*

---

24. But the efforts to distinguish civil and criminal applications of the mail and wire fraud statute have not been persuasive, and seem unlikely to carry the day. *See id.* at 139 (Calabresi, J., dissenting) ("there is no basis in the revenue rule itself for treating criminal and civil cases differently").

For reasons described above and in petitioners' brief, reading the mail and wire fraud statutes to encompass schemes to evade foreign taxes is certain to create friction with foreign governments and to interfere with the operation and administration of their laws. *See supra* at 24-28; Pet. Br. 12-13. As Judge Learned Hand explained decades ago, when a U.S. court passes upon the construction and validity of foreign tax laws, it involves itself in "the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted (sic) to other authorities" and in doing so "may commit the domestic state to a position which would seriously embarrass its neighbor." *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (Hand J. concurring). This concern is far from hypothetical. In *McNab*, the district court and the Court of Appeals disregarded declarations by Honduran legal authorities about the state of Honduran law. *See McNab*, 331 F.3d at 1235 n.7, 1242. The court's position ultimately led the government of Honduras to file a brief *amicus curiae* in support of the defendants' petition for certiorari in this Court. *See id.* at 1240 n.23. If U.S. courts are routinely required to make difficult judgments about the scope, contours, and validity of foreign tax and revenue laws, embarrassing disagreements and diplomatic incidents of this kind are certain to occur with increasing regularity.

As discussed above, *see supra* at 11-12, 24, there is no indication on the face of the wire fraud statute that Congress intended to abrogate the revenue rule and incorporate the violation of a foreign tax law as a predicate for criminal prosecution. Because the statute is silent on this topic and this dramatic change would unreasonably interfere with the sovereignty of other nations, this Court's settled precedents require a narrower interpretation. *See F. Hoffman-LaRoche*, 124 S. Ct. at 2366.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

BRENDAN DOWD
FRANK GOLDMAN
JEREMY MALTBY
MARK TEETER
JAMES WALDEN
O'MELVENY & MYERS, LLP
7 Times Square
New York, New York 10036
(212) 326-2000

JOSHUA L. DRATEL
(Consel of Record)
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1150 18th Street, NW
Suite 950
Washington, D.C. 20036
(212) 732-0707

QUENTIN RIEGEL
NAT'L ASS'N OF MANUFACTURERS
Vice President, Litigation & Deputy General Counsel
1331 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 637-3000

Attorneys for Amici Curiae

Dated: June 29, 200